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No. 08-1476

IN THE
Supreme Court of the United States

DWIGHT J. LOVING,
Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE AND
UNITED STATES DEPARTMENT OF THE ARMY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Under Article 71(a) of the Uniform Code of Military Justice ("UCMJ"), the President must affirmatively approve any court-martial death sentence, and Petitioner sought production of the sentencing recommendations about his case through a Freedom of Information Act request.

1. Do persons sentenced to death under the UCMJ have a due process right to see sentencing recommendations that are made to the President before he or she approves the sentence?

2. Do the presidential communications and deliberative-process privileges apply to sentencing recommendations made to the President in capital cases under the UCMJ?

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BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Institute of Military Justice ("NIMJ") is a District of Columbia non-profit corporation dedicated to advancing the fair administration and public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers, several as flag and general officers.

NIMJ appears regularly as an *amicus curiae* before the United States Court of Appeals for the Armed Forces, and appeared before this Court as an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

NIMJ is actively involved in public education through its website, www.nimj.org, and its numerous publications.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

More than thirty years after this Court held in *Gardner v. Florida*, 430 U.S. 349, 362 (1977), that due process is offended "when a death sentence is imposed, at least in part, based on information which the defendant had no opportunity to deny or explain," army private Dwight J. Loving ("Petitioner") awaits the word of the President of the United States to learn whether his death sentence will be carried out based on sentencing reports that the government has refused to let him see. Four other service members on military death row have faced, or will face, the same plight unless this Court grants certiorari in this case and confirms that condemned service members have the same due process rights to access their sentencing reports as civilian defendants. The Court's decision in this case will also determine whether the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), will be permitted to serve its "core purpose" of letting citizens know how their government works. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989).

The decision of the United States Court of Appeals for the District of Columbia Circuit, which denied Petitioner access to sentencing recommendations in his own capital court-martial case, is based on an inaccurate application of this Court's past FOIA decisions and a fundamental misunderstanding of the President's role in the military death sentencing process. In *United States Department of Justice v. Julian*, 486 U.S. 1, 13 (1988), this Court held that FOIA's "Exemption 5," which exempts agency records from disclosure where

those records are routinely privileged in litigation, does not bar disclosure of presentencing reports to the subjects of those reports. The Court of Appeals failed to consider whether Petitioner, like other criminal defendants, has a right to see his sentencing reports such that the government's claimed FOIA exemptions become inapplicable under *Julian*. This Court should now grant review to consider that critical question.

This Court's death penalty jurisprudence establishes that the sentencing authority (ordinarily, a judge or a jury) must make an individualized determination as to whether to sentence a defendant to death, and that defendants have a right to know the information on which their death sentence is based. Under the Uniform Code of Military Justice ("UCMJ"), the President has a unique role in the sentencing process that requires him to render a personal judgment as to whether to approve of a death sentence and execute a service member. Unlike the President's constitutional power to pardon, which is wholly discretionary and exercised, if at all, only after a sentence is final, the President is affirmatively required by the statute to review the court record in capital courts-martial and decide whether to approve death sentences. The President's role as a sentencing authority in capital court-martial cases is judicial in nature – a distinction the Court of Appeals failed to appreciate. Basic due process principles require that the government not sentence a service member to death based on secret information given to the President while he is acting in a quasi-judicial capacity.

Additionally, the presidential communications privilege and the deliberative-process privilege,

which are designed to protect executive branch decision-making, do not apply when the President is serving in a quasi-judicial role. The fair administration of military justice is disserved by a rule that would sentence service members to death based on information that is not disclosed to the defendant. Moreover, such secrecy does not further any legitimate executive concerns in this case. At least in the absence of a specific claim that disclosure of Petitioner's sentencing recommendations would harm national security or cause harm to third parties, those recommendations should be disclosed to the subject service member in the interests of fair administration of military justice. In other words, the mere assertion that sentencing recommendations are protected from disclosure by executive privileges is insufficient to uphold the government's burden of showing under FOIA Exemption 5 that such recommendations are not routinely available to defendants in litigation. Accordingly, this Court should grant certiorari to consider the narrow, but important, issue presented as to whether due process requires disclosure of sentencing recommendations to the service member or defense counsel before the President approves a court-martial death sentence.[2]

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[2] Aside from disclosure of sentencing recommendations to the defendant or defense counsel, this case does not concern, and NIMJ does not presently take any position with respect to, whether service members are entitled to any additional due process protections in connection with presidential approval of court-martial death sentences.

STATEMENT

Since the adoption of the UCMJ in 1950, the military has executed ten service members under the UCMJ's provisions. Cynthia Swarthout Conners, *The Death Penalty in Military Courts: Constitutionally Imposed?*, 30 UCLA L. Rev. 366, 369 (1982). The last time such an execution took place was April 13, 1961, when John A. Bennett—whose Army death sentence was approved by President Eisenhower and carried out during President Kennedy's administration—was hanged for rape and attempted murder. Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 Mil. L. Rev. 1, 1-3 (1994). At present, there are a total of five service members (including Petitioner) under military death sentences.[3] Criminal Justice Project, NAACP Legal Def. & Educ. Fund, Inc., *Death Row U.S.A.* 67 (Winter 2009), available at http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2009.pdf ("*Death Row U.S.A.*") (identifying five service members under military death sentences). Of these five, the President already has approved the execution of Private Ronald A. Gray and is currently considering Petitioner's death sentence. *Bush OKs Execution for*

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[3] In addition to the five service members under military death sentences, there are four other service members who have been convicted of capital crimes, but are presently awaiting a retrial or are in the direct appeal process. *Death Row U.S.A.*, *supra*, at 67.

Army Death Row Inmate, MSNBC.com, July 29, 2008, http://www.msnbc.msn.com/id/25891431.[4]

The important constitutional issues in this case are likely to recur as other service members on death row attempt to use FOIA to obtain access to sentencing recommendations received by the President in their cases. The Court of Appeals' published decision in this case has the effect of creating a new rule that would categorically deny all service members on death row access to sentencing recommendations given to the President in capital court-martial cases. Accordingly, there is a pressing need for this Court to clarify now both the due process rights possessed by military service members on death row and the functioning of FOIA when court-martial capital prisoners seek access to their own presidential sentencing recommendations.

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[4] Mr. Gray's execution currently is stayed pending a habeas petition in the U.S. District Court for the District of Kansas. *See Execution Stayed for Ex-Soldier in Murder Case*, MSNBC.com, Dec. 2, 2008, http://www.msnbc.msn.com/id/28019409/wid/18298287.

ARGUMENT

I. REVIEW IS NEEDED TO CLARIFY THAT FOIA EXEMPTION 5 IS INAPPLICABLE BECAUSE SERVICE MEMBERS HAVE A RIGHT TO KNOW THE INFORMATION ON WHICH THEIR DEATH SENTENCE IS BASED.

A. *Julian* controls because Petitioner is the subject of the requested documents.

By enacting FOIA, Congress created a "broad right of access to official information." *Reporters Comm.*, 489 U.S. at 772 (citing *EPA v. Mink*, 410 U.S. 73, 80 (1973)). FOIA's basic policy requires "full agency disclosure unless information is exempted under clearly delineated statutory language." *Id.* at 773 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976)). This policy, in turn, focuses on "the citizen's right to be informed about 'what their government is up to.'" *Id.* The citizen's need to "be informed about what their government is up to" is never more acute than when a government official – here, the President of the United States – is entrusted with the discretionary determination of whether to end the life of that American citizen.

In *Julian*, this Court held that a criminal defendant is entitled under FOIA to obtain copies of his or her own presentencing reports. 486 U.S. at 14. The Court reasoned that, while statutory privileges may prevent disclosure of these reports to third party FOIA requesters, these privileges do not apply to requesters who are the subjects of the reports they seek. *Id.* at 12-14. A few months after *Julian*, in *Reporters Committee*, this Court ruled that, pursuant to Exemption 7 dealing with privacy concerns, *third parties* could not use FOIA to obtain access to

criminal history reports or "rap sheets." 489 U.S. at 780. It also emphasized that "Congress clearly intended the FOIA to give any member of the public as much right to disclosure as one with a special interest in a particular document." *Id.* at 771 (internal citations omitted).

Since *Reporters Committee*, lower courts have continued to recognize the principle articulated in *Julian* that "a person who requests records pertaining to himself has rights that will sometimes—albeit rarely—differ from those of other, third party requestors." *Sinito v. U.S. Dep't of Justice*, 176 F.3d 512, 516-17 (D.C. Cir. 1999). On the other hand, lower courts generally have refused to extend language in *Julian* that suggests the identity of the requester may be relevant to a FOIA request, to contexts where the FOIA requester is not the subject of the report. *See, e.g., United Techs. Corp. v. FAA*, 102 F.3d 688, 691-92 (2d Cir. 1996) (third party FOIA requester seeking confidential documents is not entitled to requested documents, even though it claimed that it already had knowledge of the confidential information in the documents).

Rather than harmonize this Court's FOIA precedents, the Court of Appeals relied exclusively on *Reporters Committee* and refused to apply *Julian*. *See Loving v. Dep't of Def.*, 550 F.3d 32, 39 (D.C. Cir. 2008) ("*Loving III*"). *Julian* is nearly directly on point. Similar to Petitioner's FOIA requests, which seek access to sentencing recommendations about Petitioner's own capital case, the requesters in *Julian* sought access to presentencing reports about their own cases. 486 U.S. at 3. *Reporters Committee*, an Exemption 7 privacy case concerning third-party requesters, should neither control this case nor the

cases of similarly situated service members who seek access to sentencing recommendations about their own capital cases.

B. The Court of Appeals failed to consider Petitioner's due process rights in the context of a military death penalty case.

The Court of Appeals failed to consider whether Petitioner has a due process interest to copies of the sentencing recommendations transmitted to the President under Article 71(a) of the UCMJ. *See Loving III*, 550 F.3d at 39 (stating that "[w]e need not decide whether *Gardner* gives Loving the [due process] right he claims"). The primary duty of this Court is to pass judgment on constitutional issues, *see, e.g.*, *Commonwealth of Mass. v. Laird*, 400 U.S. 886, 894 (1970), and it should take this opportunity to do so. Certiorari should be granted to confirm that disclosure of these sentencing recommendations is constitutionally required under the Court's settled death penalty jurisprudence, such that the asserted privileges do not bar disclosure of these recommendations to Petitioner and FOIA Exemption 5 is inapplicable.

1) The Court's death penalty jurisprudence recognizes that capital defendants have a right to access the sentencing procedures that determine life or death.

The Court has not yet considered the impact of its modern death penalty jurisprudence on the President's unique duty to render judgment as to the appropriateness of a court-martial death sentence before that sentence is made final. However, the Court has "recognized that death is a different kind of punishment from any other" and the "sentencing process, as well the trial itself, must satisfy the

requirements of the Due Process Clause." *Gardner*, 430 U.S. at 358. The Court should grant certiorari to affirm that its settled death penalty jurisprudence applies throughout the capital court-martial process.

The Court has consistently held that the sentencing authority in a capital case must make an individualized determination as to whether to impose the death penalty and it may not be precluded from considering as a mitigating factor any aspect of the defendant's character or record that would lessen the severity of the punishment. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases."); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (sentencing process must permit consideration of the "character and record of the individual offender and the circumstances of the particular offense"). Further, military courts have regularly applied the Court's death penalty jurisprudence to courts-martial. *See United States v. Matthews*, 16 M.J. 354, 369-70 (C.M.A. 1983) (relying on *Furman v. Georgia*, 408 U.S. 238 (1972), to invalidate the then-existing military death penalty system); *United States v. Thomas*, 46 M.J. 311, 315 (C.A.A.F. 1997) (relying on *Mills v. Maryland*, 486 U.S. 37, 383-84 (1988), for the rule that heightened procedural reliability is necessary in capital cases).

But the constitutional promise that a death sentence must be based on consideration of all the available information about the defendant is an empty one if he or she does not have access to the recommendations upon which presidential approval

rests. *Gardner* is particularly relevant. There, the trial judge sentenced the defendant to death based in part on a presentence investigation report, portions of which were confidential and not disclosed to defendant. 430 U.S. at 351-53. The Court held that the trial judge's use of a confidential presentence report violated Gardner's due process rights, *id.* at 362, reasoning that "giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases" is an important component of the criminal justice system's "truth-seeking function." *Id.* at 360; *see also United States v. Davenport*, 151 F.3d 1325, 1328 (11th Cir. 1998) (noting that the purpose of timely disclosure of presentencing information to the defendant "is to ensure accuracy and fairness in sentencing by allowing the defendant adequate time to review and verify the information"); *United States v. Huckaby*, 43 F.3d 135, 138 (5th Cir. 1995) (noting that presentence investigation reports "do not conform to the rules of evidence and may contain errors" and that a defendant must therefore be given the "opportunity to object to errors"). Sentencing based upon truthful and accurate information is particularly critical in the context of capital cases. As this Court explained:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson, 428 U.S. at 305.

2) The procedure for presidential approval must comply with due process because presidential approval is an essential element of imposing a death sentence under the UCMJ.

Members of the armed forces who are tried and convicted by court-martial are entitled to due process of law under the Fifth Amendment. *Middendorf v. Henry*, 425 U.S. 25, 43 (1976).[5] What process is due "depends upon an analysis of the interests of the individual and those of the [military] regime to which he is subject," and a court reviewing legislatively approved military procedure "must give particular deference to the determination[s] of Congress." *Id.* (citation omitted); *see also Weiss v. United States*, 510 U.S. 163, 164 (1994). The due process rights guaranteed to a service member under the UCMJ and its implementing regulations may be greater than or less than the due process rights guaranteed in the civilian context under the Fifth Amendment, *United States v. Eshalomi*, 23 M.J. 12, 24-25 (C.M.A. 1986), but if less, then the burden rests upon the government to justify the different treatment. *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976); *see also* 10 U.S.C. § 836(a).

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[5] Article 2(a)(10), 10 U.S.C. § 802(a)(10), as amended in 2006, also subjects certain civilians to trial by court-martial. NIMJ takes no position on the constitutionality of that amendment, but notes it to make clear that the issue raised here may not be limited to cases involving uniformed personnel.

The court-martial system is unique in extending an extraordinary protection to those tried for capital crimes: presidential approval is required before a death sentence may be imposed. Article 71(a) of the UCMJ states in its entirety:

> If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit. That part of the sentence providing for death may not be suspended.

10 U.S.C. § 871(a). This "presidential approval requirement adds an additional layer of protection for an accused in the military death penalty system," and it compensates for fewer or less rigorous due process protections in other facets of the court-martial system. Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 Mil. L. Rev. 1, 24-30 (2006).

Under Article 76 of the UCMJ, a death sentence may not be imposed and is not final until after the sentence has been approved by the President. It provides that "[t]he appellate review of records of trial . . . and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter . . . are final and conclusive." 10 U.S.C. § 876. As this Court held with respect to Article of War 53, the immediate statutory predecessor of the present Article 76, finality in this article defines "the terminal point for proceedings within the court-martial system." *Gusik v. Schilder*, 340 U.S. 128, 132 (1950); *see also Loving v. United States*, 62 M.J.

235, 242-43 (C.A.A.F. 2005) ("*Loving II*") (citing *Gusik* and ruling that Petitioner's death sentence is not final until presidential approval). Indeed, pursuant to his constitutional authority as commander-in-chief of the armed forces and the broad power delegated to him by Congress to promulgate procedural rules for courts-martial, the President sits at the apex of the military justice system. *See* U.S. Const., art. II, § 2; 10 U.S.C. § 836(a).

The requirement for presidential approval is analogous to the requirement that the convening authority review and approve of sentences imposed by a general court-martial. Article 60(a) of the UCMJ provides that "[t]he findings and sentence of a court-martial shall be reported promptly to the convening authority after the announcement of the sentence," so that the convening authority may decide whether to approve or disapprove of the sentence. 10 U.S.C. § 860(a). Additionally, as with presidential approval of death sentences, Article 60(d) provides that "the convening authority or other person taking action under this section shall obtain and consider the written recommendation of his staff judge advocate or legal officer." 10 U.S.C. § 860(d). The purpose of this recommendation "is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative." Rule for Courts-Martial ("R.C.M.") 1106(d)(1).

When the executive branch promulgated the Rules for Courts-Martial to implement the UCMJ, it explicitly provided that the staff judge advocate or legal officer must serve the record of the legal proceedings, together with sentencing

recommendations, on the defendant and defense counsel before those materials are transmitted to the convening authority pursuant to Article 60. *See* R.C.M. 1106(d)(6). Further, these rules provide that defense counsel may "submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter." R.C.M. 1106(f)(4). The defendant and defense counsel also must be served with any additional material submitted to the convening authority and given an opportunity "to submit comments." R.C.M. 1106(f)(5). Military courts have held that service of these sentencing recommendations on the defendant and defense counsel "is a critical part of the accused's post-trial representation," *United States v. Mark*, 47 M.J. 99, 101 (C.A.A.F. 1997), and that failure to effect service is tantamount to absence of counsel at that "important stage" of the judicial process. *United States v. Moseley*, 35 M.J. 481, 484-85 (C.M.A. 1992). Indeed, "absent some waiver by the defense, a staff judge advocate has an obligation to provide correct information to the convening authority, for there can be no justice, no due process of law, where a convening authority is substantially misled as to fact or law." *United States v. Dowell*, 15 M.J. 351, 353 (C.M.A. 1983).

In contrast to the regulations that govern sentencing recommendations transmitted to the convening authority, however, the Rules for Courts-Martial do not expressly require service on the defendant or defense counsel of sentencing recommendations transmitted to the President. *See* R.C.M. 1204(c)(2)) (setting forth the procedure that must be followed with respect to presidential

approval). In light of the President's essential role in the sentencing process, however, some minimum due process applies to the President's decision-making process. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (where government creates judicial procedure to protect rights, that procedure must satisfy the Due Process Clause even if procedure itself is not constitutionally required). A grant of certiorari in this case would not require this Court to determine the full extent of the due process protections that attach to the presidential approval process, but this Court should take this opportunity to rule that due process requires that a service member not be put to death based on secret, undisclosed information about that service member in presidential sentencing recommendations. *See Gardner*, 430 U.S. at 361.

3) The President's power and duty to approve of a military death sentence is judicial in nature.

The purpose of the presidential approval requirement codified in Article 71(a) is to guarantee that a death sentence will not be imposed until after the President makes a personal judgment that a service member should be put to death. This requirement historically is derived from British law and the Articles of War, which were adopted in the early days of the Republic. Indeed, in affirming Petitioner's death sentence on direct appeal in his criminal case, this Court explained that, in Britain, "it was the Crown that . . . tempered the excesses of courts-martial wielding the power of capital punishment. It did so by stipulating in the Articles of War (which remained a matter of royal prerogative) that all capital sentences be sent to it for revisions or approval." *Loving v. United States*,

517 U.S. 748, 764 (1996) ("*Loving I*") (citing Charles M. Clode, *The Administration of Justice Under Military & Martial Law* 9-10 (London, John Murray 1872)). The original intent of the presidential approval requirement was one of mercy, as military tribunals were prone to severity. Clode, *supra*, at 145.

The Second Continental Congress passed a series of acts between June 30, 1775 and June 18, 1777 that provided certain high-ranking officials with the power to "pardon" or "mitigate" death sentences and certain other punishments ordered by a court-martial. Joshua M. Toman, *Time to Kill: Euthanizing the Requirement for Presidential Approval of Military Death Sentences to Restore Finality of Legal Review*, 195 Mil. L. Rev. 1, 79-80 (2008). This power to pardon served as a check of mercy on the excesses of the court-martial system. *See* Clode, *supra*, at 145 (discussing British military law and stating that the stay of an execution was "only intended to give His Majesty an opportunity of extending His Royal Mercy by Pardon or Reprieve") (internal citation omitted).

Importantly though, in 1786, the Second Continental Congress abandoned the use of the words "pardon" and "mitigate" in favor of "confirmation" and "disapproval" to describe the power and duty of certain high-ranking officials to review court-martial decisions before a sentence of death could be executed. *See* Toman, *supra*, at 80. From 1786 to 1796, this power and duty to confirm or disapprove was entrusted to Congress. *See id.* In 1796, however, Congress modified military law to provide that no court-martial death sentence in time of peace could be executed until after a record of the

proceedings were "laid before the *President of the United States* for his confirmation or disapproval, and orders in the case . . . ." *Id.* at 80-81 (emphasis added). Today, under Article 71(a) of the UCMJ and R.C.M. 1204 and 1207, a record of the legal proceedings and sentencing recommendations must be transmitted to the President to assist in his decision whether to approve of a death sentence by court-martial. R.C.M. 1204(c)(2).

The distinction between the pardon power, which is wholly discretionary, and the presidential approval requirement, which involves the exercise of a quasi-judicial judgment, is important. In 1892, the Secretary of War disseminated an opinion from the Department of Justice that concluded that the approving and pardoning powers are separate and that granting one to an authority does not necessarily grant the other. Headquarters of the Army, Adjutant General's Office, General Orders, No. 27 2-3 (April 6, 1892), *in General Orders & Circulars, Adjutant General's Office, 1892* (Washington, Gov't Printing Off. 1893). The Department explained that "the confirming or approving of the sentence of the court-martial became a revision of the proceedings like that of an appellate court. The pardoning and mitigating power remained to be exercised on different grounds, resting wholly in the arbitrary discretion of the pardoning power." *Id.* at 2.

A trio of nineteenth-century cases holds that if the President's approval of a court-martial imposed sentence is required, then the President's decision is a judicial one. *See United States v. Fletcher*, 148 U.S. 84, 89-91 (1893); *United States v. Page*, 137 U.S. 673, 678-81 (1891); *Runkle v. United States*, 122 U.S. 543,

557-59 (1887). Article of War 65, a precursor to Article 71(a), required that "the sentence of a general court-martial in time of peace, to the effect that a commissioned officer be cashiered, – dismissed from service, – is inoperative until approved by the president." *Runkle*, 122 U.S. at 555. The Court in *Runkle* held that "the action required of the president is *judicial in its character*, not administrative. As commander in chief of the army, . . . [h]is personal judgment is required, as much so as it would have been in passing on the case if he had been one of the members of the court-martial itself." *Id.* at 557 (emphasis added). In *Fletcher*, this Court explained that the President's order whether to approve a court-martial sentence is "capable of division into two separate parts, – one relating to the approval of the proceedings and sentence, and the other to the executive clemency which was invoked and exercised." *Fletcher*, 148 U.S. at 90-91 (discussing *Runkle*). Later, the Supreme Court noted that these three cases "held, obviously enough, that the [language of Article of War 65] called for personal review and action by the President and that *making him*, as it did, in effect, a *member of the court*, the required review was *judicial in character* and therefore nondelegable." *United States ex rel. French v. Weeks*, 259 U.S. 326, 334 (1922) (emphasis added).

Despite this history, some military court decisions have suggested in *dicta* that the presidential approval requirement is simply a matter of clemency. *E.g.*, *Loving II*, 62 M.J. at 247 (stating that presidential review is "conducted as a matter of clemency"); *United States v. Woods*, 21 M.J. 856, 872-73 (A.C.M.R. 1986), *overruled on other grounds*, 26 M.J. 372 (C.M.A. 1988). Such *dicta* conflict with the

cases that correctly recognize that the President can exercise judicial functions in the military justice system. *See Schick v. Reed*, 483 F.2d 1266, 1270 (D.C. Cir. 1973), *aff'd*, 419 U.S. 256 (1974) ("[T]he sentence imposed by the court-martial was not effective until approved by the President, whose action was by statute made a *part of the sentencing process*.") (emphasis added). The Court should take this opportunity to reaffirm its settled precedent that the presidential approval requirement in Article 71(a) is not merely a matter of clemency but also involves action of a judicial character and that, as such, the approval process is subject to the demands of due process. At a minimum, due process in the administration of military justice requires disclosure to the affected individual of the sentencing recommendations upon which a presidential decision on the death sentence is based. In addition, as explained in Point II below, the judicial character of the presidential approval process undermines the rationale for applying the government's claims of executive privilege here.

II. REVIEW IS NEEDED TO CLARIFY THAT EXECUTIVE PRIVILEGES DO NOT APPLY TO JUDICIAL DECISIONS TO IMPOSE A DEATH SENTENCE.

In the area of executive privileges, the Court's jurisprudence has focused on the existence and the scope of the presidential communications privilege where the executive branch claims that confidentiality is needed to perform "executive" duties that involve making policy decisions and judgments. It is in this context that the Court has held that the presidential communications privilege is necessary to guarantee the candor of presidential

advisors and to provide "[a] President and those who assist him . . . [with] free[dom] to explore alternatives in the process of shaping policies and making decisions and to do so in way many would be unwilling to express except privately." *United States v. Nixon,* 418 U.S. 683, 708 (1974); *see also Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 383-84 (2004) (in considering privilege's applicability to materials of the National Energy Policy Development Group, the Court held that "[e]xecutive privilege is an extraordinary assertion of power not to be lightly invoked").

The Court of Appeals' decision, which concluded that the presidential communications and deliberative-process privileges bar disclosure of Petitioner's sentencing recommendations, placed those recommendations squarely within the traditional bounds of the wholly discretionary prerogative of the executive branch and outside the judicial process. *See Loving III*, 550 F.3d at 39-41. This is especially evident from the court's reliance on its FOIA opinion in *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108 (D.C. Cir. 2004)). In that case, a third party requester sought agency documents that would shed light on the President's exercise of his pardon power under Article II. *Id.* at 1109-11. Noting that the pardon power is a "quintessential and non-delegable Presidential duty," *id.* at 1119, involving "discretion" and "autonomy," *id.* at 1117, the court of appeals ruled that "the presidential communications privilege applies to *pardon documents* 'solicited and received' by the President . . ., and that the deliberative process privilege applies to internal agency documents," *id.* at 1123 (emphasis added).

But this case is not about the pardon power. Nor is it about the deliberative process that the Executive employs when making policy decisions and judgments. Rather, it is about whether the presidential communications and deliberative-process privileges apply to sentencing recommendations transmitted to the President in a judicial process set forth in the UCMJ to sentence a service member to death. The Court has never considered whether and how executive privileges apply to adjudicatory decisions made by the executive branch concerning the sentencing of individual defendants in the military criminal justice system.

In *Nixon*, 418 U.S. at 713, the Court recognized that executive privileges "cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." Indeed, "the ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Id.* at 709. Accordingly, in the civilian criminal justice system, the factual sections of a presentence report must be disclosed to the defendant and defense counsel, subject to certain enumerated exceptions. Fed. R. Crim. Proc. 32(c). The defense is also given a right to comment on the report. *Id.*

This same right is required by due process in the military criminal justice system. Lower courts already have acknowledged that executive privileges may not protect communications relating to adjudicatory decisions from disclosure. The District of Columbia Circuit observed that "there may be instances where the docketing of conversations between the President or his staff and other

Executive Branch officers may be necessary to ensure due process." *Sierra Club v. Costle*, 657 F.2d 298, 406-07 (D.C. Cir. 1981) (reasoning that "where such conversations directly concern the outcome of adjudications or quasi-adjudicatory proceedings[,] there is no inherent executive power to control the rights of individuals in such settings."); *see also In re Sealed Case*, 121 F.3d 729, 746 n.17 (D.C. Cir. 1997) (explaining that "the White House's *ex parte* contacts with outside agencies may be subject to disclosure by statute"). The Court should grant certiorari to consider and clarify the applicability of executive privileges in the administration of military justice where the President is required to make an adjudicatory decision about whether to approve of a death sentence.

CONCLUSION

Service members on death row have a right to know the information that is provided to the President when that official is called upon to approve the death sentence. Because of the importance of this right and the recurring nature of the issue, the Court should grant certiorari to consider whether, in the context of the administration of military justice in a capital case, the presidential communications and deliberative-process privileges are sufficient bases for denying access to sentencing recommendations made to the President.

Respectfully submitted.

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